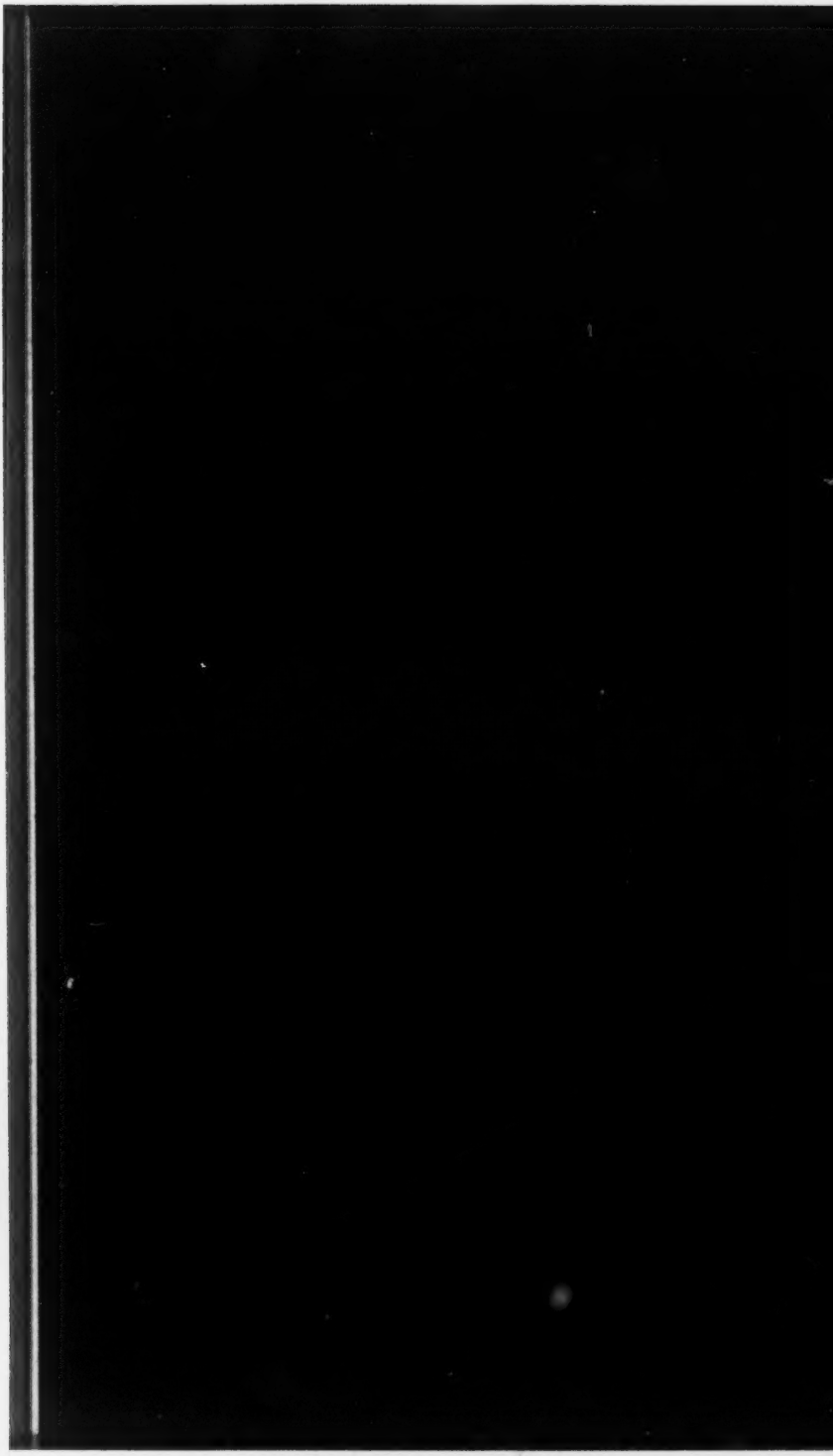

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1942

No.

MILLER LAND AND LIVESTOCK CO.,
Petitioner and Appellant below,

vs.

FRANK BOGART,
Respondent and Appellee below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION BELOW.

The opinion of the Circuit Court is reported in 129 F. (2d) 772. (A note thereto sets out order of District Court Judge.)

II.

STATEMENT OF GROUNDS OF JURISDICTION.

1. The statutory provisions believed to sustain the jurisdiction of this Court are U. S. C. Title 28, Section 347, and Section 24, Subdivision c, of National Bankruptcy Act.

2. The statutes of the United States that are involved are Title 11, Section 203, Subdivisions k and l (Section 75, Subdivisions k and l of Bankruptcy Act) which, as far as is thought to be material, read as follows:

(From subsection l):

> "The Court may, after hearing and for good cause shown, at any time during the period covered by an extension proposal that has been confirmed by the Court, set the same aside, reinstate the case and modify the terms of the extension proposal."

(and from subsection k):

> "nothing herein shall prevent the reduction of the future rate of interest on all debts of the debtor, whether secured or unsecured."

3. The original issues involved arise on the pleading summarized and quoted from in the petition for the writ. In addition to some $12,000.00 it involves questions of general importance because it involves the jurisdiction of the Court to act in matters of importance to practically every party in a debtor or reorganization proceeding, viz.: the power of the Court to control interest rates. The question of the control

of interest in proceedings designed to assist in the rehabilitation or reorganization of a debtor is of great and often decisive importance. The power of the Court to adjust interest, when it should adjust interest and how it should adjust it are involved in the holding of the Circuit Court, who have construed this simple beneficial law in a manner that denies the benefit of its provisions to the petitioner and will stand in the way of all who seek to follow after. The total amount of interest in all such cases is involved.

We submit that it is untenable to hold, as the Circuit Court did, that:

a. Discrimination is involved (unless it be in favor of Mr. Bogart).

b. That the order of the District Court is inequitable.

The record does show that:

a. That all secured claimants, except Mr. Bogart, had waived all interest or more, nevertheless the Circuit Court holds that Mr. Bogart was discriminated against because the Court reduced the interest rate on his claim from 6% to 4%.

b. To assume that all interest rates must be equal otherwise discrimination is presumed is untenable in the absence of proof of the nature of the various claims or that they constitute a class or what the interest rates were.

c. When it was made to appear to the Circuit Court of Appeals that on the new issue they had created, the record was incomplete and exactly

opposite from the facts they assumed, they should have ordered the record on that issue brought up.

4. A case believed to sustain jurisdiction is as follows:

Borchard v. California Bank, 206 U. S. 311.

III.

STATEMENT OF THE CASE.

This has already been done in petition for writ under Paragraph I, which for the sake of brevity and economy is hereby adopted and made a part of this brief.

IV.

SPECIFICATIONS OF ERROR.

The Circuit Court of Appeals erred in holding that:

I. That the said order of the District Court should be reversed.

II. The Judge of the District Court had no jurisdiction to make the order.

III. The petition for rehearing and perfecting its record on the question of discrimination should be denied.

V.

ARGUMENT.

On specifications of error I and II the writer believes that the able dissenting opinion of Circuit Court Judge Garrecht in this case constitutes a more able argument on the true issues involved than counsel could make. Such argument already being in the record as part of the decision to be reviewed, it is deemed unnecessary to repeat it in this brief. Counsel feels that the majority opinion went off on a tangent, by-passed the true issues, misconstrued the allegations before it and created an issue that was not before it, nor had such issue been before the District Judge. What is material is the question of whether or not, a district court on a petition for reduction in interest rate is ousted of jurisdiction to grant such reduction because the security is greater in amount than the claim. To state it another way, is the contract right to future interest on an obligation that is amply secured a vested right that cannot be disturbed even though to reduce the interest would aid in rehabilitating the debtor, reduce the time within which all claims might be paid, and the creditor is acting in bad faith? These are constitutional questions of importance not only in a Farm Debtor proceeding but in reorganizations of all kinds, because the power to act in all stems from the same source.

VI.

ARGUMENT ON POINT III.

If for the sake of argument only we assume that the question of discrimination is involved, the majority opinion completely overruled the fact that (Page 55 of Transcript of Record) it is alleged (referring to secured creditors):

> "That all of said creditors have waived their claims for interest and have discounted the face of their claims for various amounts."

In the petition for rehearing, the debtor included an application for completing the record on the new point raised by the Circuit Court by showing the Court that the record on that point would show *that Mr. Bogart after and under the Court order would get a higher rate of interest than any other creditor.* (See Petition for Rehearing, Page 6, Paragraphs III, IV, V and IX.)

The majority decision of the Circuit Court being based upon a new issue not raised by the pleadings, nor covered by the record (except allegations that showed no discrimination against Mr. Bogart), should have ordered the record completed so that there would be a record on that point. However, the writer feels that it cannot be assumed that equality of interest rates between claims is necessarily equity. The record does show that there were all kinds of claims. There were large, small and medium in amount, there were secured claims of all sizes and nature. In some cases the value of its security was increasing; other security

was decreasing in value. (Page 54, Paragraph 6, of Transcript of Record.) Can it be said that a rigid rule must be laid down by this Court that a difference in interest cannot be allowed, and that the Court has no jurisdiction to change any one rate of interest downward? If such a principle be laid down, then the original proposal could have been attacked because it contained a provision regarding secured claims that,

> "unpaid balances to bear interest at the existing contract rate". (Page 3 of Transcript of Record.)

It does not appear what the existing contract rates on other claims were as compared to the rate on Mr. Bogart's claim, except that Abbott Co. were "attempting" to charge 9%. (Page 55 of Transcript of Record; also Page 12 of Petition for Rehearing.) But if it is proper for a court to *require the debtor to pay interest rates according to various contracts covering the entire legal range of rates of interest from no interest to the highest rate thus requiring discrimination between creditors how then can it be said that the court would lose jurisdiction, on equitable grounds, to change a rate of interest,* even though it is different from another claimant's rate of interest?

It is interesting to speculate on the true basis for interest but the writer at least cannot see justification for an equitable rule that a small claim, secured by depreciating security being used up to increase the value of land security must bear the same rate of interest as a well secured mortgage. Certainly many distinctions exist. One is a safe long term investment

of a relatively large sum. The other is an incident connected with a sale on credit of relatively perishable goods. The expenses of servicing a loan or credit in the case of a small loan or credit are greater in proportion to the amount involved. The risk is greater in the case of a credit sale of machinery than is incurred in a real estate mortgage for $150,000.00 on security worth $800,000.00 and which over more than twenty years had already paid $220,000.00 in interest alone. Surely such a prime investment proposition could be properly classified as such and the interest rate adjusted so that by increasing productivity and value all involved would receive their principal and a fair rate of interest sooner.

Unless the security is worth more than the debt no interest is ordinarily allowed on a claim in bankruptcy. There might be a surplus over all debts but any claim for interest of a secured debt after the security was exhausted would be only for a pro rate share of the surplus. (See 8 C. J. S. 1280.) Therefore the law regarding a change of interest rate is only useful to the debtor and his unsecured creditors where there is an excess of value of security over the debt it secures. Yet the Circuit Court holds that to reduce the interest rate on such over secured claim is "sacrificing him" that it "discriminates" against him.

Thus they say this "equity" is above the law and that the court has no "jurisdiction" to follow the law. On the allegations of the Petition the equities were and are with the debtor. See

In re Chicago Reed & Furniture Co., Levin v. Johnson, 7 F. (2d) 885.

Yet the Circuit Court found that the legal position of the creditor was such that it invoked equity on his behalf. The Circuit Court in searching for an analogy drew it from *Case v. Los Angeles Lumber Products Co.*, 308 U. S. 106, 60 S. Ct. 1, but such analogy is not true because in that case persons were included in the plan who had no equity to protect. In the case at bar there were equities to protect; on this one claim alone $650,000.00 of equities to protect for the unsecured creditors and the debtor.

This application of the law by the Circuit Court changes the law in the same manner that the now discredited "good faith" being the equivalent of "able to pay all debts in full within three years" theory that arose in the lower courts changed it and prevented thousands from benefiting by the act. Unless the true construction is determined by this Court this decision of the Circuit Court will spread across the land and district judges will feel themselves bound to turn down justified petitions for reduction of interest rates to the detriment of debtors and their unsecured creditors.

SUMMARY.

a. The order of the District Court should not have been reversed because it was fully justified by the law and the facts before the Court.

b. To hold, as the Circuit Court did, that the record showed discrimination is contrary to the undisputed record.

c. Equality of interest rate is not necessarily equity and every claim should be judged by its own circumstances. Discrimination, if an issue, must be proven not assumed.

d. Where the record shows that all other secured creditors had waived interest, an order reducing interest from 6% to 4% on the one remaining secured claim is not discrimination.

f. The issue of discrimination being raised by the Circuit Court for the first time, debtor's application to have the record completed on that point should have been allowed or the affidavit in support should be taken as true.

g. The right to control interest rates upon proper application is an important power of the Court and the discretion of the District Court in lowering the interest rate from 6% to 4% on a claim should not have been disturbed by the Circuit Court. The Court has this power as an attribute of equity where the conduct of a creditor shows bad faith. A court is not nor should it be helpless to use its discretion against a creditor in bad faith who by his actions seeks to take $800,000.00 worth of security for a debt of $150,000.00, thus protecting unsecured creditors and the debtor, as set out in the original petition.

h. That to construe the law as the Circuit Court did is to make that portion of the law unworkable.

i. That the issue is of great importance to many.

WHEREFORE your petitioner respectfully submits that the writ should issue in this cause and that on hearing the order of the District Court should be affirmed and order of the Circuit Court of Appeals herein reversed.

Dated this 6th day of November, 1942.

MILLER LAND AND LIVESTOCK CO.,
Petitioner.

By C. T. BUSHA, JR.,
C. LIEBERT CRUM,
Counsel for Petitioner.